Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1978
No. 78-460

LIS, EDWIN J., JR., LIS, DEBBIE T. and LIS, JASON, Infant, by His Father, EDWIN J. LIS, JR.,

Petitioners

vs.

THE ROBERT PACKER HOSPITAL, GUTHRIE CLINIC, LTD., ALLEN, DR. WAYNE H.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF THE RESPONDENTS IN OPPOSITION

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COUNTER-STATEMENT OF THE CASE

The Respondents submit the following counter-statement of the case, not to correct any gross inaccuracies in the statement of the case contained in the Petitioners' brief, but to include several references omitted by the Petitioners which Respondents believe material to the consideration of the question presented. The statement of the Petitioners was prepared in disregard of the plethora of evidence presented by the Respondents in which the jury based its findings that the Defendant-physician's negligence was not a proximate cause of the injury sustained by the infant, Jason Lis, and that the negligence of the laboratory technicians was not a proximate cause of injury to Jason (A. 127-129).

The evidence established that Jason Lis was born on May 18, 1974, at the Robert Packer Hospital in Sayre, Pennsylvania and no abnormalities were noted at birth (Transcript, Vol. III, pp. 103-104). The child's development during the period from birth to September 19, 1974, was recited by his pediatrician, Dr. Pacanowski (Transcript, Vol. III, pp. 104-112), who concluded that the child had developed satisfactorily and was a healthy infant as of September 3, 1974 (A. 55).

On September 19, 1974, the infant was brought by ambulance to the emergency room of the Robert Packer Hospital and admitted (Transcript, Vol. VI, p. 174). The physician in the emergency room, Dr. Jones, testified that on admission the child was not breathing and cyanotic and was approaching a state of clinical death (Transcript, Vol. VI, pp. 179-180). It was further the opinion of Dr. Jones

that the child suffered a convulsion or seizure (Transcript, Vol. VI, p. 184).

After receiving emergency room treatment, Jason was admitted under the care of Dr. Wayne Allen (A. 22). Dr. Allen died several months prior to the trial (Transcript, Vol. VI, p. 71) and his deposition was read into the record and is transcribed in Vol. VI of the testimony, pp. 73-138. Dr. Allen made a presumtive diagnosis of diabetes mellitus with diabetic acidosis and ordered a dose of insulin (A. 84, 85). The diagnosis was subsequently proven erroneous and the child was in fact not diabetic (A. 102, also Transcript, Vol. V, pp. 141-142).

On the afternoon of September 20, 1974, Jason began to evidence seizures which continued throughout his hospitalization (A. 56, Transcript, Vol. II, p. 13). On October 14, 1974, he was taken to Children's Hospital in Boston for observation and testing (Transcript, Vol. II, p. 43, 45).

The Petitioners contended that Dr. Allen was negligent in his diagnosis and treatment of Jason, specifically in ordering the administration of insulin and further contend that the episode of hypoglycemia which resulted from the insulin injection caused a pre-existing brain abnormality to manifest itself resulting in brain damage and retardation of Jason (A. 7).

The defense presented nine medical witnesses to establish its position that the seizures experienced by Jason and his present condition are not the result of the administration of insulin, but due to a pre-existing brain disorder, congenital in nature. It is significant to note that six of the nine physicians were also fact witnesses since all six observed Jason and some also treated him, namely, Dr. Pacanowski (Vol. III), Dr. Jones (Vol. VI), Dr. Buckthal (Vol. VII), Dr. Flynn (Vol. VIII), Dr. King (Vol. VIII), Dr. Bresnan (Vol. IX). Drs. MacKay, Pacanowski and Cornblath testified that under the circumstances there was a reasonable basis for Dr. Allen's diagnosis of diabetic acidosis (Transcript, Vol. IV, p. 44; Vol. VII, pp. 26-32; Vol. VIII, p. 159).

The defense submitted direct testimony from four physicians as to the brain disorder of Jason. Dr. Flynn, a Board Certified Neurologist on the staff of the Guthrie Clinic (Transcript, Vol. VII, p. 52) who examined Jason, stated in his opinion that Jason evidenced a brain atrophy which predated his admission on September 19, 1974 (Transcript, Vol. VII, p. 73) and that the seizures were the result of the atrophy and not related to the administration of insulin (Transcript, Vol. VII, pp. 75, 81).

Dr. Buckthal, a Board Certified Neurologist on the staff of the Guthrie Clinic (Transcript, Vol. VII, pp. 118-119), concluded after his examination and testing of Jason that there was significant diminution of Jason's brain (Transcript, Vol. VII, p. 155); that is, he suffered from a cortical atrophy (Transcript, Vol. VII, p. 156) and that the condition predated its discovery by at least one month (Transcript, Vol. VII, p. 158), and that the administration of insulin had no effect on the condition (Transcript, Vol. VII, p. 171).

Dr. Strand, a pediatric neuro-radiologist on the staff of the Children's Hospital Medical Center in Boston (Transcript, Vol. VIII, pp. 5-8), reviewed the x-ray films of Jason in October 1974. He testified that Jason suffered from approximately a 30% loss by volume which existed

prior to his admission to the Robert Packer Hospital on September 19, 1974 (Transcript, Vol. VIII, p. 42).

Finally, Dr. Bresnan, a pediatric neurologist also on the staff of the Children's Hospital Medical Center in Boston (Transcript, Vol. IX, p. 3), testified that he evaluated Jason in Boston in 1974 (Transcript, Vol. IX, p. 12); he concluded that Jason suffered from a cerebral dysgenisis, that is, a brain abnormality, which pre-existed prior to his admission to the Robert Packer Hospital on September 19, 1974 (Transcript, Vol. IX, p. 19).

There further was testimony by several of the physicians to the effect that the apparently normal development of the child up to September 19, 1974, was not inconsistent with the subsequent discovery of the abnormal development of the child's brain since the condition may be completely unrecognized in a child in his early months of life (Dr. Buckthal, Vol. VII, p. 151; Dr. Strand, Vol. VIII, p. 31; Dr. Flynn, Vol. VIII, p. 86; Dr. Bresnan, Vol. IX, p. 36; Dr. Pacanowski, Vol. III, p. 178). Testimony was also presented that the seizure activity of Jason was not related to the administration of insulin and that the treatment by Dr. Allen had no effect on the child's condition which was later discovered.

After a trial of nine days on the liability aspect of the case only, the jury found as follows: (1) that the Defendant Dr. Wayne H. Allen did negligently diagnose or negligently treat Jason Lis in September 1974; (2) that Dr. Allen's negligence was not a proximate cause of injury suffered by Jason Lis; (3) that Dr. Allen was an employee or agent of the Guthrie Clinic, Ltd. at the time he treated Jason Lis; (4) that there were no risks presented by the administration of 15 units of insulin to Jason Lis on September 19, 1974, which a reasonable person would consider material or substantial to his or her decision whether or not to have the treatment administered; (5) that the laboratory technicians of the Robert Packer Hospital were negligent in their processing of the stat tests ordered by Dr. Allen as to Jason Lis on September 19, 1974, and (6) the negligence of the laboratory technicians was not a proximate cause of injury to Jason Lis (A. 127-129).

On May 16, 1977, the Plaintiffs filed a motion for a new trial. By order dated July 12, 1977, the motion was denied for failure to comply with the practice order of the Court regarding briefs in support of post-trial motions.

An appeal was filed in the Third Circuit Court of Appeals on July 9, 1977. By opinion and order entered June 23, 1978, the Court of Appeals, Aldisert, C.J., affirmed the judgment of the District Court.

ARGUMENT

The Respondents respectfully request that the Court deny the petition for writ of certiorari seeking review of the Third Circuit's opinion in the case. The Respondents submit that the issues raised by the petitioners do not warrant review in that only questions of evidence and factual findings are involved and the case turns on its own unique set of facts. Furthermore, the decisions cited by the Petitioners are not in conflict with the Court of Appeals' decision under review.

The Petitioners argue that the writ of certiorari should be granted to preserve the integrity of the existing rule governing reversible error as set forth in *McCandless v. U.S.*, 298 U.S. 342, 56 S.Ct. 764, 80 L.Ed. 1205 (1936), and *Kotteakos v. U.S.*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946). It is their position that the Court of Appeals' finding that the Petitioners were "not visited with such prejudice as to entitle them to a new trial" is in clear conflict with prior Supreme Court decisions.

The Petitioners' reliance on *McCandless v. U.S.*, supra, regarding harmless error is misplaced. In that case the Court stated the well-settled rule that "an erroneous ruling which related to the substantial rights of a party is ground for reversal unless it affirmatively appears from the whole record that it was not prejudicial". Further, *Kotteakos v. U.S.*, supra, also relied on by petitioners, involved the question as to whether the Petitioners suffered substantial prejudice from being convicted of a single general conspiracy. In discussing the then Federal harmless-error statute (Section 269 of the Judicial Code, 28 U.S.C. Section 391) this Court stated that, although the statute makes no distinction between civil and criminal causes, this does not mean that the same criteria should always be applied in both classes of cases to determine whether a particular error was harmless.

Certiorari should not be granted except in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between Courts of Appeals. *Rice v. Sioux City Memorial Park Cemetery,* 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955). The Respondents submit that no such conflict exists as to warrant review by this Court.

The Petitioners charge that the trial court erred in the application of Fed. R.C.P. 42 (b) regarding separate trials as to liability and damages and Fed. Rule of Evidence 611 (b) regarding the scope of cross-examination. The Court of Appeals refused to reverse because there was no showing of prejudice as to entitle the Petitioners to a new trial.

In ordinary civil cases tried in Federal Court, an appeal based upon infraction of rules will not succeed unless the infraction was substantial enough to prejudice appellant's case. *N.L.R.B. vs. Safway Steel Scaffods Co. of Ga.*, 383 F.2d 273 (C.A. Fla. 1967), certiorari denied 88 S.Ct. 1052, 390 U.S. 955, 19 L.Ed. 1150. The relevant inquiry by an Appellate Court is not whether the trial was free from errors, but whether it was free from prejudicial errors, *U.S. v. Birnbaum,* 373 F.2d 259, (C.A. N.Y. 1967), rehearing denied 385 F.2d 232, certiorari denied 88 S.Ct. 53, 389

U.S. 837, 19 L.Ed. 2d 99. Asserted errors which could not have prejudiced the unsuccessful party give no right to reversal of judgment. *U.S. v. Lane Motor Co.,* 199 F.2d 495 (C.A. Okla. 1952), affirmed 73 S.Ct. 459, 344 U.S. 630, 97 L.Ed. 622. Furthermore, he who seeks to have a judgment set aside because of an erroneous ruling carried the burden of showing that prejudice resulted. *Palmer v. Hoffman,* N.Y. 1943, 63 S.Ct. 477, 318 U.S. 109, 87 L.Ed. 645, 144 A.L.R. 719, rehearing denied 63 S.Ct. 757, 318 U.S. 800, 87 L.Ed. 1163. See also, *Sher v. DeHaven,* 1953, 199 F.2d 77, 91 U.S. App. D.C. 257, 36 A.L.R. 2d 937, certiorari denied 73 S.Ct. 797, 345 U.S. 936, 97 L.Ed. 1363.

In support of their position that errors which affect the methods and manner of trial involve the substantial right of the parties, the Petitioners cite *Degelos v. Fidelity and Casualty Co. of N.Y.,* 313 F.2d 809 (C.A. 5, 1963); *Brown v. DeVicches & Sons, Inc.,* 552 F.2d 545 (C.A. 3, 1977); and *Citron v. Aro Corp.,* 377 F.2d 750 (C.A. 3, 1967). Each can be distinguished from the present case.

In the *Degelos* case an action was filed by a widow against two liability insurance carriers for the death of her husband while a passenger in a vehicle operated by the son. The Court denied the plaintiff the right to call the son as her adverse witness. The Court of Appeals reversed stating that the lower court's ruling effectively *excluded* real cross-examination.

In *Brown* the trial court ruled to exclude certain evidence of negligence beyond a pre-trial stipulation of fact. The effect was to prevent the plaintiff from presenting his theories of negligence as part of his case in chief and required him to offer such testimony only in rebuttal.

Also in the *Citron* case, the procedural errors were an eleven day intermission of the trial by the court on its own motion coupled with the fact that the case was not submitted to the jury until two months after conclusion of the plaintiffs' case. The Third Circuit held that the substantial rights of the plaintiffs were affected by the delay and "prejudice was clearly within the range of possibility".

In the instant case there was no exclusion of evidence prejudicial to the Petitioners. The record is replete with testimony of the condition of the child prior to the date of his admission to the Robert Packer Hospital. Furthermore, the procedure followed by the trial court was discouraged by the Court of Appeals for the future, but was not considered of sufficient prejudice to warrant a new trial. The Court of Appeals found that the serious medical condition of Jason Lis was, in fact, presented to the jury in the liability aspect of the case in the form of cumulative testimony by defense witnesses that the administration of insulin did not significantly contribute to the present condition of the child because of the pre-existing damage to the brain (Opinion of the Court, p. 32 of Petition). By reason of the Court of Appeal's strongly discouraging the future use of the practices of the trial court both as to cross-examination and bifurcation of trial, the case becomes one of isolated significance and not proper for the granting of certiorari. *Rice v. Sioux City Memorial Park Cemetery,* supra.

CONCLUSION

For the reasons stated above, the Respondents contend that the petition for writ of certiorari should be denied.

Respectfully submitted,

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